SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73 573

DENIS M. VACHON,

Appellant,

—v.—

THE STATE OF NEW HAMPSHIRE,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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THE STATE OF NEW HAMPSHIRE,

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ON APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

The appellant Denis M. Vachon, appeals from a decision of the Supreme Court of New Hampshire, filed on May 31, 1973. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

Opinions Below

The majority and dissenting opinions of the Supreme Court of New Hampshire are not yet reported and are set out in the Appendix, *infra,* pp. 1a-7a.

Jurisdiction

The decisions and order of the Supreme Court of New Hampshire were filed on May 31, 1973. Appellant's Notice of Appeal was filed in the Supreme Court of New Hampshire on August 21, 1973 (App., *infra,* p. 8a). By order dated August 27, 1973, Mr. Justice Brennan extended the time for filing this jurisdictional statement to and including September 28, 1973. The jurisdiction of this court to review the decision by appeal is conferred by 28 U.S.C. §1257(2) and is sustained by the following decisions: *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966); *Dahnke-Walker Milling Company* v. *Bondrant,* 257 U.S. 282 (1921).

Statutes Involved

Section 571-A:1, New Hampshire R.S.A. Obscene defined.

Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

Section 571-A:2, New Hampshire R.S.A. Offenses.

"A person commits obscenity when, with knowledge of the nature of content thereof, he:

(a) sells, delivers or provides or offers or agrees to sell, deliver or provide, any obscene writing, picture, record or other representation or embodiment of the obscene . . . .[1]

§169:32, New Hampshire R.S.A. Contribution to Delinquency:

Any parent or guardian or person having custody or control of a child, or anyone else, who shall knowingly or willfully encourage, aid, cause or abet or connive at, or who has knowingly or wilfully done any act to produce, promote or contribute to the delinquency of such child may be punished . . . .

§169:2:II, New Hampshire R.S.A., defines a delinquent child as:

Any child who violates any law of this state or any city or town ordinance, or who is wayward, disobedient or uncontrolled by his parent, guardian or custodian or who is habitually truant from school or home or so deports himself as to injure or endanger the health or morals of himself or others.

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[1] R.S.A. §571-A:1 and 2 were the basic statutory provisions on obscenity in effect at the time of the sale of the material in question here. R.S.A. §571-A:1 was amended in 1970 to incorporate the test of *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

On August 16, 1969, subsequent to the commission of the offense with which appellant was charged, Chapter 571-B, "Exposing Minors to Harmful Materials," went into effect in New Hampshire. This chapter is patterned after the New York statute upheld by this Court in *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

Questions Presented

(1) Whether R.S.A. 169:32; 169:2:II and R.S.A. 571-A: 1 and 2, as applied to punish the sale to a minor aged fourteen of a button with the slogan "copulation not masturbation," violates the First and Fourteenth Amendments to the Constitution?

(2) Whether R.S.A. 169:32 [Contribution to delinquency] is impermissibly vague in violation of the due process clause of the Fourteenth Amendment?

Statement of the Case

On July 26, 1969, Kathleen O'Meara, a fourteen year old minor, accompanied by a girl friend, also aged 14, entered "The Head Shop," a business operated by appellant in Manchester, New Hampshire, for the purpose of purchasing a button "like that purchased by her friend the previous week." Ms. O'Meara and her friend found a velvet display card on a counter in the store, and Ms. O'Meara selected a pin with the slogan "copulation not masturbation." She showed the button to someone in the store[2] "whose name she does not know" and paid twenty-five cents for the button. Later that day the two girls went to a rectory in Manchester where a priest, Father Landry, saw the button, explained the meaning of the word "copulation" to them and took the button away (App., *infra*, p. 2a).

A complaint was filed against appellant for wilfully contributing to the delinquency of a minor by selling or caus-

[2] Ms. O'Meara testified that she did not know if the person to whom she paid the twenty-five cents could see the slogan on the button.

ing to be sold a button to the minor with obscene material, that is, the slogan "copulation not masturbation." Appellant pleaded not guilty and, having waived a jury, was tried in the Hillsborough County Superior Court.[3]

The minor testified at trial that she did not know the meaning of the word copulation until it was explained to her by the priest (Tr. 8),[4] that she had never been found guilty of a criminal offense or found delinquent in a juvenile court because of or as a result of the purchase of the button (Tr. 10).

At trial the button was introduced in evidence but the state introduced no evidence relating to its alleged obscene nature. But Father Stephens, Associate Pastor of St. Catherine's Parish in Manchester, New Hampshire, testified for the defense the button did not go substantially beyond the customary limits of candor, that the slogan has redeeming social value and that in his opinion the predominant appeal of the button was to humor (Tr. 20-21, 23)

Appellant was found guilty and sentenced to thirty days confinement in the county house of correction and fined one hundred dollars.

The federal constitutional claims concerning the obscene character of the slogan on the button were raised prior to trial in Superior Court by motion to dismiss. The motion to dismiss was denied, and appellant took the necessary exception to the denial of his motion. This question was raised and decided on appeal to the New Hampshire Supreme Court. The vagueness challenge to R.S.A. 169:32

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[3] The case was appealed to the Superior Court from a conviction in the Manchester District Court. The latter is not a court of record and the trial in Superior Court was *de novo*.

[4] "Tr." refers to the transcript of trial in Superior Court.

and 169:2:II was not raised below but was raised *sua sponte* by the New Hampshire Supreme Court. See dissenting opinion of Grimes, J., App., *infra*, p. 6a.

The New Hampshire Supreme Court affirmed the conviction of appellant for contributing to the delinquency of a minor, one judge dissenting. Judge Lampron writing for the majority ruled that "the state need only prove that the acts of the defendant could reasonably be found to contribute to cause delinquency by endangering the morals of the minor herself or others" (App., *infra*, p. 3a). The majority went on to affirm "the finding and ruling implied in the verdict of guilty that the button was obscene within the standards to be applied to minors" (App., *infra*, pp. 3a-4a). The majority opinion then expressly held that the "trial court could properly find and rule that mere possession of the button could be injurious to the minor's moral well-being by tending to convince her that copulation by a fourteen year old girl was an acceptable act. Similarly the wearing of the pin could lead to immoral solicitations thereby endangering her morals and those of others" (App., *infra*, p. 4a). The majority affirmed the trial court's conclusion that "a seller of this type of button should have realized that it would tend to be harmful to the morals of the purchaser or others" and said that "This would warrant a finding and ruling that the defendant wilfully contributed to the delinquency of this minor as charged in the complaint" (App., *infra*, pp. 4a-5a).

Judge Grimes dissented on the ground that the statute as construed by the majority was void for vagueness. In addition, he set forth his views as to how the statute could be construed more narrowly, a construction he favored in order to "avoid the constitutional invalidity" (App., *infra*, pp. 6a-7a).

THE QUESTIONS ARE SUBSTANTIAL

1. The expression "copulation not masturbation" is speech protected by the First Amendment and cannot constitutionally be deemed obscene as to minors.

Although appellant was prosecuted for "contributing to the delinquency of a minor," his conviction necessarily rests on a determination that the slogan on the button at issue was "obscene." If that determination was invalid, his conviction for contributing must necessarily fall.

New Hampshire's statutory definition of obscenity essentially reiterates the three criteria for obscenity mandated by this Court prior to *Miller* v. *California*, 41 U.S.L.W. 4925 (June 21, 1973).[5] Under both the statute and this Court's guidelines, material is obscene if, considered as a whole, its predominant appeal is to the prurient interest (a shameful or morbid interest in nudity, sex or excretion), it goes substantially beyond customary limits of candor in describing or representing such matters, and the material is utterly without "redeeming social value."

Interpreting these standards, this Court has been at pains to stress that material can be classified as obscene only if it depicts or represents erotic activity. If material does not present a rendition (either oral, visual or written) of such activity, it cannot appeal to the prurient interest and must enjoy immunity under the First Amendment. "Statutes designed to regulate obscene materials must be

[5] Because appellant was convicted prior to *Miller*, the pre-*Miller* obscenity test is controlling. Nevertheless, appellant believes that neither under the pre-*Miller* nor the post-*Miller* tests can the button be adjudged obscene.

carefully limited . . . [and] the permissible scope of such regulation" is confined to "works which depict or describe sexual conduct." *Miller* v. *California, supra* at 4927.

Both *Cohen* v. *California,* 403 U.S. 15 (1971), and this Court's obscenity decisions illustrate the sharp division between the forbidden depiction of erotic acts, and protected speech which nevertheless contains sexual allusions. Unlike the former class of material, the latter class aims at the persuasion, rather than the erotic stimulation, of its audience. Its purpose is advocacy, not stimulation; it therefore qualifies as a classic example of the "dissemination of ideas" protected by the First Amendment.

Appellant's button satisfies neither the precise criteria nor the underlying rationale for the obscenity classification. The button is surely not sexually graphic, for in no way does it "depict or represent" sexual activity. Hence, it decidedly lacks that appeal to the "prurient interest" which is a defining trait of obscenity. But even more important, the inscription—"copulation not masturbation"—is exactly that kind of polemical slogan to which *Cohen* expressly granted First Amendment immunity. Indeed, "copulation not masturbation" arguably typifies polemical speech even more closely than "Fuck the draft," for the language it employs is not provocative and visceral but neutral and abstract.

That appellant's button advocates a sexual rather than a political philosophy hardly removes it from the category of speech protected by *Cohen.* Surely the free expression which the First Amendment safeguards is not confined to statements of social and political belief but embraces state-

ments of sexual philosophy as well. The same logic which is invoked to suppress appellant's pin could readily be employed to forbid discourse on a wide range of sexual issues—abortion, for example, or birth control or homosexuality. Such prohibitions would certainly violate the First Amendment. See *Baird* v. *Eisenstadt,* 405 U.S. 438 (1972).

The New Hampshire Supreme Court relied upon the "variable obscenity" test of *Ginsberg* v. *New York,* 390 U.S. 629 (1968), as authority for classifying appellant's pin as obscene. Because it was purchased by a minor, the court reasoned, it must be measured against the stricter standard for obscenity upheld by *Ginsberg.* But it is impermissible to construe *Ginsberg* as a license for a State to proscribe all material it deems injurious to the health and morals of a minor. Such a construction would nullify this Court's recognition of the First Amendment rights of minors. See *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969). If vendors could sell to minors only material acceptable to the State, the minor's access to ideas and expression of his own choice would be drastically, perhaps fatally, impaired. The First Amendment interests of minors accordingly demand that *Ginsberg's* mandate be narrowly construed.

Appellant maintains that the *parens patriae* power of the State can eclipse the First Amendment only when the material disseminated to the minor bears some of the attributes of obscenity and makes much the same psychological appeal to the minor that obscenity makes to the adult. This test would respond to the basic insight underlying the variable obscenity doctrine of *Ginsberg*—that the immaturity and gullibility of minors make them sus-

ceptible to some forms of erotic expression to which the normal adult would be indifferent. Thus construed. *Ginsberg* requires that proscribed material be in some measure prurient and graphic. If material is non-erotic, and if its primary appeal is to the intellect, its dissemination to minors cannot be forbidden.

Appellant has already shown that his button completely lacks the explicitness and prurient appeal which characterize obscenity disseminated to adults. Its polemical, non-erotic character similarly places it beyond the reach of *Ginsberg's* broader obscenity test for minors. Suppression of appellant's pin—a neutrally phrased, inoffensive statement of sexual philosophy—would be tantamount to censoring the sale to minors of any material with sexual content. So sweeping an interference with the minor's exposure to polemical discourse, sexual or otherwise, is forbidden by the First Amendment.

Appellant's conviction must fall for the additional reason that the record is devoid of any evidence that the button is obscene. See *Thompson* v. *Louisville,* 362 U.S. 199 (1960). The only evidence in the record relating to the allegedly obscene nature of the button, apart from introduction of the pin itself, was testimony by Father Stephens, a defense witness, who testified that in his opinion the button was not obscene. *Supra,* p. 5.

It has been held that prosecution evidence directed towards proof of any of the obscenity criteria is unnecessary only when the material in issue is hard core pornography which speaks for itself and about which there can be no conceivable claim to the contrary. *United States* v. *Wild,* 422 F.2d 34 (2nd Cir. 1969); *United States* v.

Womack, 294 F.2d 204 (D.C. Cir. 1961), *cert. denied* 365 U.S. 859 (1961).

Though we believe that there can be no conceivable claim that the inscription on the pin at issue here is obscene, the very least that is required, if it is thought that its obscenity is arguable, is proof. Since the state failed to introduced any, the conviction cannot be sustained.

2. New Hampshire's contributing to delinquency statute is unconstitutionally vague.

The vagueness doctrine has long been one of the fundamental canons of due process. Its main concern is to afford potential wrongdoers reasonable notice of conduct which is proscribed. *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939). A statute will offend the vagueness doctrine if it is so imprecise and ambiguous that "reasonable men must guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). The doctrine seeks to protect those who diligently attempt to conform their behavior to the law. Thus, if a citizen of average intelligence cannot reliably discern from a statute which acts are outlawed and which are not, that statute is unconstitutionally vague.

The vagueness doctrine serves to deter improper delegation of the legislative function to the finder of fact. *Herndon* v. *Lowry,* 301 U.S. 242, 263 (1937). It prohibits statutes which invite the finder of fact to fashion his own definition of wrongful conduct. A statutory scheme is thus impermissibly vague if it permits a judge to substitute his personal moral inclinations for an objectively ascertainable test for wrongdoing. *Papachristou* v. *City of Jacksonville,*

405 U.S. 156 (1972). Since such statutory schemes are easily subject to arbitrary and discriminatory enforcement, they clash with the central interest the vagueness doctrine protects—predictable and uniform interpretation of the laws.

First, RSA 169:2:II is unconstitutionally vague in its definition of "delinquency." Second, RSA 169:32 is unconstitutionally vague in its definition of adult conduct which is deemed to "contribute" to that delinquency. In combination these two forms of vagueness severely aggravate each other. An adult who seeks to obey the statute is not only unable to learn how and when he has *contributed* to a minor's delinquency; he cannot even learn what constitutes the *delinquency* to which he is forbidden to contribute. The result is a sweeping, amorphous and unpredictable proscription on adult conduct towards minors. Deprived of reasonable notice, an adult faces the hazard of possible liability for virtually every action he takes that may affect a minor.

New Hamphire RSA 169:2:II enumerates the attributes of a "delinquent child." Under that statute, delinquency consists of the violation of a state or local law, wayward or disobedient behavior, habitual truancy, or deportment which "injures or endangers" the health or morals of the delinquent or others. While the first three forms of delinquency are arguably delineated with requisite precision, the fourth, under which appellant was charged, emphatically is not.

The phrase "injury or danger to health or morals" can be applied to an indefinite range of behavior. It encompasses both serious acts of adolescent deviance which the community would unanimously deplore, and innocent trans-

gressions which might offend some segments of the community but which others would find blameless. It is well known that the moral propriety of different forms of adolescent conduct is a subject about which parents, teachers and scholars disagree, often quite forcefully. On such matters as dress, personal appearance, sexual mores and leisure activity, there is no consensus of adult opinion. On the contrary, different schools of child-rearing advocate different, sometimes starkly opposed conceptions of adolescent welfare.

Because of this diversity of practice and belief, any statute baldly proscribing immoral adolescent conduct cannot hope to provide realistic notice of those activities which are punishable. Such a statute confides to the judge the unenviable task of assessing the ethical implications of nearly every type of adolescent behavior. Without forthright and narrowly drawn legislative standards to guide him, the judge can consult only his personal predilections. And however sincere the judge may be, he cannot begin to speak with the voice of the community, especially in an area as controversial as juvenile welfare. When the judge classifies particular adolescent conduct as delinquent, he therefore risks punishing behavior that both the minor and the adults surrounding him believe to be morally acceptable and, hence, lawful. It is precisely that risk of unforeseeable prosecution which the vagueness doctrine strives to eliminate. Cf. *Interstate Circuit* v. *Dallas,* 390 U.S. 676 (1968).

The ambiguities of RSA 169:2:II are magnified when the statute is combined with RSA 169:32 and applied not against a minor but against an adult like appellant, chargeable with contributing to the minor's delinquency. As con-

strued by the New Hampshire Supreme Court, RSA 169:32 ignores all the tests customarily used to limit the scope of criminal accessorial liability. As a result, the range of conduct which may be deemed "contributing" is virtually limitless.

First, convictions under 169:32 need not be predicated on an adjudication that the minor in question is himself delinquent; nor need the state make any showing that the minor, if prosecuted, could be adjudicated a delinquent. In the instant case, it is noteworthy that the minor, Kathleen O'Meara, not only was not adjudicated a delinquent, but that she engaged in no conduct which could sustain such an adjudication. Despite the clear blamelessness of Ms. O'Meara's own conduct, the court condemned the conduct of appellant on the theory that his acts "could reasonably be found to contribute to cause delinquency by endangering the morals of the minor herself or others." The court illustrates the potential "danger" of appellant's conduct to the "morals of the minor and others" by hypothesizing that Ms. O'Meara could infer from appellant's pin that "copulation by a fourteen year old was an acceptable act," and that "wearing of the pin could lead to immoral solicitations, thereby endangering her morals and those of others."

Under this construction, RSA 169:32 requires not the actuality, but only the prospect, however remote, of delinquency to sustain a conviction.

Further enlarging the possible scope of adult liability —and equally forbidden under the vagueness doctrine—is the statute's insistence on merely a minimal causal connection between the acts of the adult and the eventual delinquency of the minor. Delinquency of the kind that con-

cerned the New Hampshire Supreme Court will undoubtedly spring from many factors. A young girl's belief, for example, that copulation is acceptable will be formed by the attitudes of her peers, the atmosphere in her home, and her own private reflection. Compared with these influences, it is doubtful whether a button advocating "copulation not masturbation" will make a significant let alone decisive impact. Yet under the New Hampshire Supreme Court's interpretation of the statute, the vendor of that pin must bear the responsibility for the possibility that its purchaser may engage in "delinquent" conduct. Because such conduct will stem primarily from other, unrelated factors, New Hampshire RSA 169:32 operates to hold the vendor liable for behavior which he neither caused nor could prevent. Surely so indefinite a relation between conduct and liability is offensive to the vagueness doctrine.[6]

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[6] A number of state courts have struck down contributing to delinquency statutes as impermissibly vague: *State* v. *Hodges*, —— Ore. ——, 457 P.2d 491 (1969); *State* v. *Vallery*, 212 La. 1095, 35 So.2d 329 (1948); *Stone* v. *State*, 220 Ind. 165, 41 N.E.2d 609 (1942). See also *Entertainment Ventures Inc.* v. *Brewer*, 306 F. Supp. 802, 818-820 (M.D. Ala. 1969); Paulsen, The Legal Framework for Child Protection, 66 Col. L. Rev. 679, 690-691 (1966). As early as 1959, the American Law Institute recommended abolition of such crimes as "contributing to delinquency" and "corrupting morals" on the ground that "the vagueness of the current statutes in this field presents serious constitutional problems . . . " A.L.I. Model Penal Code, Tent. Draft No. 9, 1959, §207.13—comments at p. 184.

CONCLUSION

For the reasons stated above, jurisdiction should be noted.

Respectfully submitted,

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September 1973

APPENDIX

Opinion of Supreme Court of New Hampshire

IN THE

SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

STATE,

v.

DENIS M. VACHON.

May 31, 1973

Warren B. Rudman, attorney general, and *Robert V. Johnson, II*, assistant attorney general (*Mr. Johnson* orally), for the State.

Sheehan, Phinney, Bass & Green and *James E. Higgins* (*Mr. Higgins* orally), for the defendant.

LAMPRON, J. Appeal from a jury-waived trial before *Loughlin*, J. which resulted in a verdict of guilty. The complaint charged that the defendant wilfully contributed to the delinquency of a minor in violation of RSA 169:32 by selling or causing to be sold to a fourteen year old girl a button with obscene material, namely, the slogan "Copulation Not Masturbation", knowing her to be a minor. Defendant's exceptions to the denial of his pretrial motion to dismiss on the grounds that the button was not obscene as a matter of law, and that he had been denied his right to a speedy trial, that the admission of certain evidence constituted prejudicial error, that the denial of his motion to dismiss at the close of the State's case was improper, and to the verdict of guilty were reserved and transferred.

RSA 169:32 (Supp. 1972) provides in part as follows: "Any parent or guardian or person having custody or control of a child, or anyone else, who shall knowingly or wilfully encourage, aid, cause, or abet, or connive at, or has knowingly or wilfully done any act to produce, promote, or contribute to the delinquency of such child, may be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year or both." Section 2 of this chapter, in so far as material, defines a "delinquent child" as "[a]ny child who violates any law of this state or any city or town ordinance or who so deports himself as to injure or endanger the health or morals of himself or others." Section 26 provides that the provisions of this chapter are to be construed in the light of their intended purpose to protect minors from influences which might lead them to deportment injurious to their health or morals. *See State* v. *Lemelin*, 101 N.H. 404, 144 A.2d 916 (1958); Report of Commission to Recommend Codification of Criminal Laws, comments at 81 (1969).

Defendant operated a "Head Shop" on a "back alley" in Manchester where he sold "all kinds of things like beads, and a few dresses and posters." On July 26, 1969, the minor in question, then 14 years of age, accompanied by a girl friend went to this shop seeking to purchase a button or pin like that purchased by her friend the previous week. They looked around and found a velvet display card on a counter. The minor involved picked out a pin bearing the slogan described in the complaint. She showed it to someone in the store, whose name she does not know, and paid him twenty-five cents for it. The two girls then went out to eat and later to a rectory in Manchester. A priest they were visiting "saw" the pin, explained its full meaning to them, and took it away. At a jury-waived trial the defen-

dant was found guilty, sentenced to 30 days in the house of correction and fined $100.00.

The defendant argues that an essential element of the crime of contributing to the delinquency of a minor is proof that the act charged resulted in an adjudication of the minor's delinquency. This court has recently held "that the fact that the minor had not been found a delinquent in court proceedings under chapter 169 is immaterial." *State* v. *Cross,* 111 N.H. 22, 24, 274 A.2d 880, 882 (1971). A similar result has been reached in many other jurisdictions. *State* v. *Blount,* 60 N.J. 23, 27, 286 A.2d 36, 38 (1972); Annot., 18 A.L.R.3d 824 (1968); 43 C.J.S. *Infants* § 13, at 69-70 (1945). RSA ch. 169 is not only intended to protect delinquents, but more importantly to prevent nondelinquent minors from becoming delinquents. *Lovvron* v. *State,* 215 Tenn. 659, 389 S.W.2d 252 (1965). This purpose is best accomplished by protecting the latter from influences which might lead them to actual delinquency. *State* v. *Cross, supra; Ginsberg* v. *New York,* 390 U.S. 629, 640-41, 20 L. Ed. 2d 195, 204-05, 88 S. Ct. 1274, 1281 (1968).

To sustain a violation of RSA 169:32 (Supp. 1972) the State need only prove that the acts of the defendant could reasonably be found to contribute to cause delinquency by endangering the morals of the minor herself or others. *State* v. *Locks,* 94 Ariz. 134, 382 P.2d 241 (1963). The State need not prove that the defendant's act has an absolutely certain and unmistakable tendency to cause the minor to lead an idle, dissolute, or immoral life. *People* v. *Miller,* 145 Cal. App. 2d 473, 477-72, 302 P.2d 603, 607 (1956).

Evidence of the slogan on the pin was introduced by the State. We cannot hold erroneous as a matter of law the

finding and ruling implied in the verdict of guilty that the button was obscene within the standards to be applied to minors. *Ginsberg* v. *New York,* 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968); *see* RSA 571-A:1 (Supp. 1972); RSA 571-B:1 (Supp. 1972). We also hold that the trial court could properly find and rule that the mere possession of the button could be injurious to the minor's moral well-being by tending to convince her that copulation by a fourteen year old girl was an acceptable act. Similarly, the wearing of the pin could lead to immoral solicitations thereby endangering her morals and those of others. *People* v. *Miller, supra; State* v. *Blount,* 60 N.J. 23, 286 A.2d 36 (1972); *State* v. *Locks,* 94 Ariz. 134, 382 P.2d 241 (1963); *State* v. *Hixon,* 16 Ariz. App. 251, 492 P.2d 747 (1972).

It is uncontested that the defendant was in control of the premises where the sale was made. There was evidence that a girl friend of this minor had previously purchased there a pin "like that". These pins were displayed on a card on a counter. The trial court saw the minor and had an opportunity to conclude whether her minority should have been apparent to whoever sold the pin. The court could find that the defendant was aware of the character of the pins which were being offered for sale and sold in his establishment.

Defendant is charged with wilfully contributing to the delinquency of a minor by selling or causing to be sold to her the button in question. To act wilfully is "to act voluntarily and intentionally and not because of mistake or accident or other innocent reason." *State* v. *Contreras,* 105 R.I. 523, 536-37, 253 A.2d 612, 620 (1969); *accord, People* v. *Reznick,* 75 Cal. App. 2d 832, 838, 171 P.2d 952, 956 (1946). The trial court could properly find and rule

that the sale of this button to the minor was intentional. The trial court could further conclude that the seller of this type of button should have realized that it would tend to be harmful to the morals of the purchaser or others. RSA 169:32 (Supp. 1972). This would warrant a finding and ruling that the defendant wilfully contributed to the delinquency of this minor as charged in the complaint. *See State* v. *Sparrow,* 276 N.C. 499, 173 S.E.2d 897 (1970); Annot., 31 A.L.R.3d 848, 851, 854-60 (1970).

Defendant's exception to the admission of evidence of a prior purchase in defendant's shop by the minor's girl friend of a similar pin is overruled. The evidence was admissible to show the absence of mistake or accident in the sale complained of. *State* v. *Locks,* 94 Ariz. 134, 137, 382 P.2d 241, 243 (1963). There is no indication that undue prejudice resulted to the defendant from its admission. *Bunten* v. *Davis,* 82 N.H. 304, 311, 133 A. 16, 20 (1926). McCormick, Evidence 438-41 (2d ed. 1972).

Defendant also maintains that his constitutional right to a speedy trial has been violated. The sale occurred on July 26, 1969, the complaint was filed on December 16, 1969, and he was tried and convicted in the district court soon thereafter. The appeal to superior court was called for trial on November 4, 1970. Defendant's counsel asked for a continuance and thereafter on November, 1970, two additional charges were filed against him. On January 8, 1971, he filed a motion to dismiss which was heard on February 17, 1971, and denied. The case was heard on June 11, 1971. This is not a history of "purposeful or oppressive" delays. *United States* v. *Ewell,* 383 U.S. 116, 120, 15 L. Ed. 2d 627, 631, 86 S. Ct. 773, 776 (1966); *State* v. *Coolidge,* 109 N.H. 403, 412, 260 A.2d 547, 554 (1969).

Exceptions overruled.

All concurred.

GRIMES, *J., dissenting*:

In my view the statute as construed by the court is void for vagueness. It forbids acts "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Constr. Co.*, 267 U.S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126, 127 (1926); *State* v. *Albers*, 113 N.H. ——, 303 A.2d 197 (1973); *Entertainment Ventures, Inc.* v. *Brewer*, 306 F. Supp. 802 (M.D. Ala. 1969); *Coon* v. *Cupp*, 467 P.2d 140 (Or. App. 1970); *State* v. *Hodges*, 457 P.2d 491 (Or. 1969). Paulsen, *The Legal Framework For Child Protection*, 66 Colum. L. Rev. 679 (1966). Although I agree with the lofty purposes of the statute, they cannot constitutionally be accomplished by placing persons in a position of not knowing what conduct is prohibited and what is not. No one has been able to determine what conduct tends to produce delinquency of the type defined as deportment "as to injure or endanger the health or morals of himself or others". RSA 169:32 (Supp. 1972). A citizen can never know whether some act or omission of his "might just possibly, sometime, somewhere lead to some child's becoming a delinquent". *State* v. *Crary*, 10 Ohio Ops. 2d 36, 155 N.E.2d 262, 265 (1959); *see Grayned* v. *Rockford*, 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

I would construe our statute more narrowly and thus avoid the constitutional invalidity. The statute by its terms requires proof that the defendant has "knowingly and wilfully done any act to produce, promote or contribute to the delinquency of such child". RSA 169:32 (Supp. 1972). There must in other words be some criminal intent. *See* Annot., 31 A.L.R.3d 848, 860 (1970). I believe that it

must not only be proved that the defendant knowingly committed the act but also that he knew that it was an act which was likely to produce delinquency in the child.

In this case there is no evidence whatever that the defendant sold the button, that he knew it had been sold to a minor, that he authorized such sales to minors or that he was even in the store at the time of the sale. He was not shown to have the necessary criminal intent and in a case such as this it cannot be imputed to him from acts of an agent not directed by him. *Opinion of the Justices,* 25 N.H. 537, 541 (1852); *Commonwealth* v. *Kempisty,* 191 Pa. Super. 602, 159 A.2d 541 (1960); 22 C.J.S. *Criminal Law* § 84 (1961).

Notice of Appeal to the Supreme Court of the United States

IN THE

SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

No. 6392

DENIS M. VACHON,

Appellant,

v.

STATE OF NEW HAMPSHIRE,

Appellee.

Notice is hereby given that Denis M. Vachon, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Hampshire, affirming the judgment of conviction, entered herein on May 31, 1973.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

JAMES E. HIGGINS
Counsel for Appellant

August 20, 1973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-573

DENIS M. VACHON,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

The State of New Hampshire
Office of Attorney General
State House Annex
Concord, New Hampshire 03301

Warren B. Rudman
Attorney General

Robert V. Johnson, II
Assistant Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-573

DENIS M. VACHON,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

MOTION TO DISMISS OR AFFIRM

MOTION

Appellee in the above-entitled case moves to dismiss, on the ground that the appeal does not present a substantial or important federal question, or to affirm, on the ground that the decision below is correct and warrants no further review.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of New Hampshire, handed down on May 31, 1973, are set forth in the Appendix, pp. 1a-7a, of the Jurisdictional Statement of Appellant.

STATEMENT OF THE CASE

The facts of the case are set out in the majority opinion of the New Hampshire Supreme Court and at pp. 4-6 of the Jurisdictional Statement of Appellant.

ARGUMENT

The defendant was charged and found guilty under New Hampshire statutes with wilfully having contributed to the delinquency of a minor by selling or causing to be sold a button to the minor with obscene material printed upon it, that is, the words "copulation not masturbation." As properly reasoned by the New Hampshire Supreme Court, to sustain a violation the

"State need only prove the acts of the defendant could reasonably be found to contribute to cause delinquency by endangering the morals of the minor herself or others." State v. Vachon, 112 N.H. ___. Such proof is a factual issue and the determination of same properly was for the trier of fact, in this case the trial court. Being an issue of fact, it is not subject to review on appeal.

Neither the trial court nor the New Hampshire Supreme Court expressly found that the slogan on the button was obscene. Even if the slogan was not obscene, a conviction is sustainable upon a finding, as set forth above, that the slogan reasonably could contribute to cause delinquency of the minor. No resolution of an obscenity issue, therefore, is a prerequisite in this case to the conviction of the defendant.

Finally, the four to one decision of the New Hampshire Supreme Court impliedly and favorably resolved any constitutional issue of vagueness of the statute.

CONCLUSION

No substantial or important federal question being presented, the appeal should be dismissed. In the alternative, the decision below being correct and not warranting further review, the appeal should be affirmed.

Respectfully submitted,

Warren B. Rudman
Attorney General

Robert V. Johnson,II
Assistant Attorney General

Office of Attorney General
State House Annex
Concord, New Hampshire 03301

Attorneys for Appellee

October 30, 1973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-573

DENIS M. VACHON,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

PETITION FOR REHEARING

The State of New Hampshire
Office of Attorney General
State House Annex
Concord, New Hampshire 03301

Warren B. Rudman
Attorney General

Robert V. Johnson, II
Assistant Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-573

DENIS M. VACHON,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

PETITION FOR REHEARING

The State of New Hampshire
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Concord, New Hampshire 03301

Warren B. Rudman
Attorney General

Robert V. Johnson, II
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-573

DENIS M. VACHON,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

PETITION FOR REHEARING

The Appellee respectfully petitions the Court for rehearing or hearing in the first instance.

STATEMENT OF THE CASE

The Appellant was convicted of a violation of New Hampshire R.S.A., Chapter

169, Section 32, in that he willfully contributed to the delinquency of a minor by selling or causing to be sold to a fourteen year old girl a button with obscene material printed thereon, namely, the slogan "Copulation Not Masturbation", knowing her to be a minor. On appeal the New Hampshire Supreme Court affirmed this conviction. The Appellant thereafter appealed to this Court, jurisdiction being conferred by 28 U.S.C. § 1257(2).

In this Court the Appellant filed his Jurisdictional Statement, dated August 20, 1973. The Appellee filed its Motion To Dismiss Or Affirm, dated October 30, 1973. In a per curiam decision, dated January 14, 1974, this Court reversed and remanded, Mr. Justice Rehnquist, with whom the Chief Justice and Mr. Justice White

joined, dissenting.

STATEMENT OF GROUNDS FOR PETITION

The Appellant presented two issues to this Court for review, namely, the matter of obscenity of the material in the light of First Amendment free speech protection, and the matter of vagueness of the statute. No issue was presented to this Court concerning the adequacy of the evidence in the trial court that the Appellant had the requisite direct or imputed criminal intent. Nevertheless, without noting jurisdiction, this Court pursuant to Supreme Court Rule 40 (1)(d)(2) reversed and remanded, basing its decision upon a resolution of this unpresented issue. Although within the discretion of this Court, such procedure effectively denies to a party litigant, in this case the Appellee, the fair and

fundamental right to brief and argue its position. Summary reversal on the basis only of the Appellant's Jurisdictional Statement properly therefore should be reserved for only the clearest of "plain error not presented" and then only after probable jurisdiction has been noted or certiorari granted and the case briefed and argued. There is no "plain error" in the instant case.

The Appellee respectfully states that the majority decision of this Court misconstrues the language of the New Hampshire Supreme Court in that Court's construction of a state statute. The statute provides in pertinent part that no one shall "knowingly or willfully encourage, aid, cause or abet or connive at, or . . . knowingly or willfully (do) any act to produce,

promote or contribute to the delinquency of such child . . ." It clearly is not an element of the offense that the Appellant must personally have sold the obscene material to the minor. And to require proof of such an additional element is, as noted in the dissenting opinion of this Court (Opinion, p. 10), to rewrite the New Hampshire statute.

The New Hampshire Supreme Court, based on the trial transcript, properly ruled that the evidence was sufficient to sustain the state's burden that the Appellant knowingly contributed to the delinquency of the minor. No where in the New Hampshire Supreme Court's construction of the statute does that Court find that the Appellant must personally have sold the material. The statutory element of "knowingly or will-

fully" is satisfied beyond a reasonable doubt by the evidence of the case. The State of New Hampshire, Appellee, has no alternative but to read the majority opinion of this Court as imposing, in the absence of an appropriate federal constitutional challenge and without benefit to the Appellee of brief or oral argument, an additional element of proof upon the prosecution--an element neither required by the definition of the offense nor by the authoritative construction of the statute by this state's highest court. The Appellee respectfully submits that the Court has erred.

Wherefore, the Appellee respectfully requests that this petition for rehearing be granted, jurisdiction noted and the case set for briefs and oral argument.

Respectfully submitted,

Warren B. Rudman
Attorney General

Robert V. Johnson, II
Assistant Attorney General

By: _____

Office of Attorney General
State House Annex
Concord, New Hampshire 03301

Attorneys for Appellee

February 5, 1974

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

_____
Robert V. Johnson, II
Assistant Attorney General

I hereby certify that all copies required to be served with the foregoing petition for rehearing have been served by forwarding by United States mail, first class postage prepaid, a copy of the foregoing petition for rehearing to each counsel of record at his post office address, in accordance with [illegible].

Robert L. Johnson, II
Assistant Attorney General

VACHON *v.* NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

No. 73-873. Decided January 14, 1974

On the basis of evidence that a 14-year-old girl bought a button inscribed "Copulation Not Masturbation" at a store operated by him, appellant was convicted of "wilfully" contributing to the delinquency of a minor in violation of a New Hampshire statute. The New Hampshire Supreme Court affirmed. *Held:* An independent examination of the trial record pursuant to Supreme Court Rule 40 (1) (d) (2) discloses that evidence is completely lacking that appellant personally sold the girl the button or that he was aware of the sale or present in the store at the time, a fatal void in the State's case that was not filled by appellant's concession at trial that he "controlled the premises" at the time. A conviction based on a record completely lacking any relevant evidence as to a crucial element of the offense charged violates due process.

— N. H. —, 306 A. 2d 781, reversed and remanded.

PER CURIAM.

A 14-year-old girl bought a button inscribed "Copulation Not Masturbation" at the Head Shop in Manchester, New Hampshire. In consequence, appellant, operator of the shop, was sentenced to 30 days in jail and fined $100 after conviction upon a charge of "wilfully" contributing to the delinquency of a minor in violation of New Hampshire's Rev. Stat. Ann. § 169:32 (Supp. 1972).[1] In affirming the conviction, the New Hampshire Supreme Court held that the "wilfully" component of the offense required that the State prove that the accused acted " 'voluntarily and intentionally and not

[1] The statute provides in pertinent part:

"[A]nyone . . . who . . . has knowingly or wilfully done any act to . . . contribute to the delinquency of [a] child, may be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year or both."

because of mistake or accident or other innocent reason.'" — N. H. —, 306 A. 2d 781, 784 (1973). Thus, the State was required to produce evidence that appellant, knowing the girl to be a minor,[2] personally sold her the button, or personally caused another to sell it to her. Appellant unsuccessfully sought dismissal of the charge at the close of the State's case on the ground that the State had produced no evidence to meet this requirement, and unsuccessfully urged the same ground as a reason for reversal in the State Supreme Court. We have reviewed the transcript of the trial on this issue, pursuant to Rule 40 (1)(d)(2) of the Rules of this Court.[3]

Our independent examination of the trial record discloses that evidence is completely lacking that appellant personally sold the girl the button or even that he was aware of the sale or present in the store at the time. The girl was the State's only witness to the sale. She testified that she and a girl friend entered the store and looked around until they saw "a velvet display card on a counter" from which they "picked out [the] pin." She went to some person in the store with the button "cupped in [her] hand" and paid that person 25 cents for the button. She did not say that appellant was that person,

[2] The complaint charged that appellant "did wilfully contribute to the delinquency of a minor by selling or causing to be sold a button with obscene material with slogan on same, to wit, 'Copulation Not Masturbation' to . . . a minor child of the age of 14 years, knowing the said child was a minor . . . ."

[3] The rule provides, in pertinent part, that: "Questions not presented according to [the requirements of this rule] will be disregarded, save as the court, at its option, may notice a plain error not presented." This discretion has been long acknowledged, see *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547 (1910), recently affirmed, see *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320 n. 6 (1971), and extends to review of the trial court record, see *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941). See also *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

or even that she saw him in the store. Rather, she testified that she could not identify who the person was. We therefore agree with Justice Grimes, dissenting, that "there is no evidence whatever that the defendant sold the button, that he knew it had been sold to a minor, that he authorized such sales to minors or that he was even in the store at the time of the sale." — N. H., at —, 306 A. 2d, at 785. This fatal void in the State's case was not filled by appellant's concession at trial that he "controlled the premises on July 26." That concession was evidence at most that he operated the shop; it was in no way probative of the crucial element of the crime that he personally sold the minor the button or personally caused it to be sold to her.

In these circumstances, the conviction must be reversed. "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process." *Harris* v. *United States*, 404 U. S. 1232, 1233 (1971). (DOUGLAS, J., in chambers); *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Johnson* v. *Florida*, 391 U. S. 596 (1968); see also *Adderley* v. *Florida*, 385 U. S. 39, 44 (1966).

The judgment is reversed and the case is remanded to the New Hampshire Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

Appellant Denis M. Vachon operates the Head Shop in Manchester, New Hampshire, where he sells various beads, dresses, posters, and the like. In July 1969, a 14-year-old girl, accompanied by her girl friend, went to the shop seeking to purchase a button or pin like the

one purchased by her friend the previous week. She found the button, inscribed "Copulation Not Masturbation," and purchased it from a sales person in the store. It was conceded in the New Hampshire courts that appellant was in control of the premises where the sale was made. At a jury-waived trial, appellant was convicted of contributing to the delinquency of a minor, a statutory offense proscribed in these words:

> "[A]nyone . . . who shall knowingly or wilfully encourage, aid, cause, or abet, or connive at, or has knowingly or wilfully done any act to produce, promote, or contribute to the delinquency of [a] child, may be punished . . . ." N. H. Rev. Stat. Ann. § 169:32 (Supp. 1972).

The Supreme Court of New Hampshire affirmed appellant's conviction. — N. H. —, 306 A. 2d 781 (1973).

The Court decides that appellant's conviction under this statute violates rights secured to him by the Due Process Clause of the Fourteenth Amendment, concluding on the basis of its "independent examination of the trial record" that "evidence is completely lacking that appellant personally sold the girl the button or even that he was aware of the sale or present in the store at the time."

I

In one sense there can be no doubt that the Court's conclusion is based upon an "independent examination of the trial record," since the claim sustained here was neither made in constitutional form to the Supreme Court of New Hampshire, nor even presented by appellant in his jurisdictional statement in this Court.*

*Appellant makes two contentions in his jurisdictional statement: First, that the New Hampshire statutes defining contributing to the delinquency of a minor and sale and delivery of obscene material (N. H. Rev. Stat. Ann. §§ 571-A:1, 571-A:2 (Supp. 1972)) have been

A litigant seeking to preserve a constitutional claim for review in this Court must not only make clear to the lower courts the nature of his claim, but he must also make it clear that the claim is constitutionally grounded. *Bailey v. Anderson*, 326 U. S. 203 (1945). The closest that appellant came in his brief on appeal to the Supreme Court of New Hampshire to discussing the issue on which this Court's opinion turns is in the sixth section (at 17–18), which is headed: "The State's failure to introduce any evidence of scienter should have resulted in dismissal of the charge following the presentation of the State's case." Appellant in that section makes the customary appellate arguments of insufficiency of the evidence and does not so much as mention either the United States Constitution or a single case decided by this Court. The Supreme Court of New Hampshire treated these arguments as raising a classic state law claim of insufficient evidence of scienter; nothing in that court's opinion remotely suggests that it was treating the claim as having a basis other than in state law.

The Court purports to decide the scienter question on the basis of Rule 40 (1)(d)(2) of the Rules of this Court, which provides:

> "1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—
>
> . . . . . .
>
> "(d)(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari,

---

applied to the sale of the button by appellant in a way that infringes upon his First and Fourteenth Amendment rights; and, second, that the New Hampshire statute defining contributing to the delinquency of a minor is unconstitutionally vague. There is simply nothing else presented by the jurisdictional statement.

> but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

The very language of this rule makes it clear that it applies to this Court's review of cases in which it has previously either noted probable jurisdiction or granted certiorari. The cases cited by the Court in support of what it does here are therefore necessarily cases in which review had been granted and which had been orally argued; in addition, each of those cases arose in the federal courts. See *Columbia Heights Realty Co.* v. *Rudolph*, 217 U. S. 547 (1910); *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971).

Whatever the import of Rule 40 (1)(d)(2) in cases arising in the federal courts, it surely does not give this Court the power to simply ignore the limitations placed by 28 U. S. C. § 1257 on our jurisdiction to review final judgments of the highest court of a State. That jurisdiction permits review in this Court by appeal where a state statute has been upheld against a federal constitutional challenge, or by writ of certiorari where a federal constitutional challenge is made in the state court and there rejected. Our prior cases establish that we will "not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969). See *Crowell* v. *Randell*, 10 Pet. 368 (1836). Since the Supreme Court of New Hampshire was not presented with a federal constitutional challenge to the sufficiency of the evidence, resolution of this question by the Court is inconsistent with the congressional limitation on our

jurisdiction to review the final judgment of the highest court of a State.

II

Even if appellant's sufficiency-of-the-evidence contention in the Supreme Court of New Hampshire could be said to have been presented as a federal constitutional claim based on *Thompson* v. *Louisville*, 362 U. S. 199 (1960), I would nonetheless be unable to join in the Court's disposition of it. In *Thompson*, the only state court proceedings reaching the merits of the case were in the Louisville Police Court from which there was no right of appeal to any higher state court, and there was therefore no state court opinion written which construed the statute under which Thompson was convicted. This Court therefore had no choice but to engage in its own construction of the statute and upon doing so it concluded that the record was "entirely lacking in evidence to support any of the charges." *Id.*, at 204. *Thompson* was obviously an extraordinary case, and up until now has been saved for extraordinary situations; it has not heretofore been broadened so as to make lack of evidentiary support for only one of several elements of an offense a constitutional infirmity in a state conviction.

Here, however, the Supreme Court of New Hampshire construed the state statute defining contributing to the delinquency of a minor, and held that the evidence adduced at the trial was sufficient to support a finding on each element of that offense. While the Supreme Court of New Hampshire did say, as the Court indicates, that the State was required to prove that the accused acted " 'voluntarily and intentionally and not because of mistake or accident or other innocent reason,' " — N. H., at —, 306 A. 2d, at 784, it said this in a context of several paragraphs of treatment of the elements of the offense. Just as those reading and relying upon our opinions would

be ill-advised to seize one phrase out of context, I think we are ill-advised to so treat the opinion of the Supreme Court of New Hampshire. That court had several observations to make about the statutory offense which bear on the issue of "wilfulness" upon which this Court focuses:

> "It is uncontested that the defendant was in control of the premises where the sale was made. There was evidence that a girl-friend of this minor had previously purchased there a pin 'like that.' These pins were displayed on a card on a counter. The trial court saw the minor and had an opportunity to conclude whether her minority should have been apparent to whoever sold the pin. The court could find that the defendant was aware of the character of the pins which were being offered for sale and sold in his establishment.
>
> "Defendant is charged with wilfully contributing to the delinquency of a minor by selling or causing to be sold to her the button in question. To act wilfully is 'to act voluntarily and intentionally and not because of mistake or accident or other innocent reason.' [Citations omitted.] The trial court could properly find and rule that the sale of this button to the minor was intentional. The trial court could further conclude that the seller of this type of button should have realized that it would tend to be harmful to the morals of the purchaser or others. R. S. A. 169:32 (Supp. 1972). This would warrant a finding and ruling that the defendant wilfully contributed to the delinquency of this minor as charged in the complaint. [Citations omitted.]" — N. H., at —, 306 A. 2d, at 784.

The Court simply casts aside this authoritative construction of New Hampshire law, seizes one phrase out

of context, and concludes that there was no evidence to establish that the appellant "[knew] the girl to be a minor, personally sold her the button, or personally caused another to sell it to her." The word "personally" is the contribution of this Court to the New Hampshire statute; it is not contained in the statute, and is not once used by the Supreme Court of New Hampshire in its opinion dealing with the facts of this very case. Indeed, the entire thrust of the opinion of the Supreme Court of New Hampshire is that appellant need not *personally* have sold the button to the minor nor *personally* have authorized its sale to a minor in order to be guilty of the statutory offense. The only fair reading of the above-quoted language from the Supreme Court of New Hampshire is that the word "wilfully" in the statute does *not* mean *"personally,"* and the facts that the appellant controlled and operated the shop, that the same type of pin had been previously purchased at the shop, and that the pins were prominently offered for sale were sufficient evidence on the issue of wilfullness.

This may seem to us a somewhat broad construction of the language "wilfully" or "knowingly," though our own cases make it clear that we are dealing with words which may be given a variety of meanings by their context:

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States* v. *Murdock*, 290 U. S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and

> purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness." *Spies* v. *United States*, 317 U. S. 492, 497–498 (1943).

But since our authority to review state court convictions is limited to the vindication of claims of federal rights, we must take the meaning of the statute, and of the words "wilfully" and "knowingly" which it uses, as given to us by the Supreme Court of New Hampshire. I would have thought such a proposition well settled by our prior decisions:

> "We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court." *Garner* v. *Louisiana*, 368 U. S. 157, 166 (1961).

We do have constitutional authority in appropriate cases to hold that the State's construction of its statute is such that the statutory language did not give a criminal defendant fair warning of the conduct which is construed to be embraced within it. *Cole* v. *Arkansas*, 333 U. S. 196 (1948); *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964). But this is a far cry from our own rewriting of a state statute in order to make it require a highly specific intent, and then turning around and saying that there was no evidence before the state courts to prove the kind of intent which we have said the statute requires. I would at least note probable jurisdiction over the appeal and set the case for oral argument. Since the Court instead chooses, without ever having heard argument, to rewrite the New Hampshire statute and substitute its interpretation for that of the Supreme Court of New Hampshire, I dissent.